SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1278

EDD PRUITT AND MARJORIE ANN PRUITT,

Petitioners,

v.

HELENE CURTIS INDUSTRIES, INC.
AND COSMAIR, INC.,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NOW COMES Cosmair, Inc., one of the Respondents in the above styled cause and files this its reply to Petitioner's Application for Writ of Certiorari.

Statement of the Case

Respondent desires to make some minor corrections to the Statement of the Case as related by the Petitioner. On page 5 of the petition the Petitioner states that both Mrs. Hendren and the wife noted the warning on the product "For Professional Use Only". The wife testified that she did not see such warning on either product. Record, pages 60, 72 and 74. Mrs. Hendren did see the warning and when asked what it meant to her, she answered "Well, that if you didn't know how to use it—if you didn't know what you were doing, you'd best better leave it alone". Record, page 184.

On page 6 of their application the Petitioners state "It being the belief of both the wife and Mrs. Hendren that the L'Oreal Creme Developer fitted the Helene Curtis description of a good grade of fresh twenty-volume hydrogen peroxide that could be mixed with Helene Curtis Blue Bleach". This statement is in direct conflict to the uncontradicted evidence. The wife testified that she did not know whether the twenty-volume creme peroxide was the same as a fresh twenty-volume hydrogen peroxide. On page 221, Mrs. Hendren testified that they were not the same. These statements are made in the petition in an attempt to excuse Petitioners' ignoring the Helene Curtis instruction: "Do Not Mix Helene Curtis New Blue Bleach With Anything Except Helene Curtis Creme Developer (Or A Good Grade of Fresh Twenty-Volume Hydrogen Peroxide)".

Again on page 6 of the application the Petitioner makes the statement that after making the strand test, Mrs. Hendren rinsed off the hair used in the test before mixing the remainder of the batch and applying the mixture to all the hair. There is no testimony in the record that the strand of hair used in the test was ever rinsed off until the entire mixture was washed out of the wife's head.

Petitioners did not request any issues of the trial court under the Federal Food, Drug & Cosmetic Act, 21 U.S.C.A., paragraph 361, or make a motion for an instructed verdict

under such act. Instead they sought to place their recovery under the Federal Hazardous Substance Labeling Act, 15 U.S.C.A., paragraph 1261.

Reasons for Denying the Writ

Sub-section 5 of Rule 38 of the Supreme Court Rules provide, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor". The decision in the present case at bar is not in conflict with the decisions of another Circuit Court of Appeals on the same matter; does not decide an important question of local law in a way probably in conflict with applicable local decisions; does not decide an important question of Federal law which has not been, but should be, settled by this Honorable Court; does not decide a Federal question in a way probably in conflict with applicable decisions of this Honorable Court and has not, so far, departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

On page 19 of their application the Petitioners make the statement, "Thus, having found no error in the instructions, the Fifth Circuit should have affirmed the jury verdict". A casual reading of the opinion refutes this statement. On page 7 of the opinion the Court states, "The mere imposition of strict liability on cosmetic makers does not, however, as the trial court's charge assumed, mean that the maker is liable for any harm to anybody under any circumstances". Again on page 8 of the opinion the Court stated, "The trial court's submission of strict liability ignores these principles". After making these general statements condemning the charges and the instruction, the Fifth Circuit then proceeded to base its opinion on the fact that the Respondents were entitled to an instructed verdict. Since Petitioner's evidence was insufficient to warrant liability under strict liability the Fifth

Circuit never reached or discussed the Respondent's complaints with reference to the Court's instructions and charges.

Petitioners do not point out any local decision or decisions of any Circuit Court that are in conflict with the present opinion. They merely complain because the Fifth Circuit exercised its right to hold that the evidence was insufficient to support a cause of action against Respondents. In *Shirey v. Louisville & Nashville Railroad Company*, 327 F.2d 549, the Fifth Circuit quotes from *Reuter v. Eastern Air Lines*, 226 F.2d 443, the following:

> "In determining whether there is sufficient evidence to take the case to the jury, a federal judge performs a judicial function and is not a mere automaton. Gunning v. Cooley, 281 U.S. 90, 93, 50 S. Ct. 231, 74 L. Ed. 720. He must determine, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it. Improvement Co. v. Munson, 14 Wall. 442, 448; see Railway Express Agency v. Mallory, 5 Cir., 168 F.2d 426, 427. The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict. Myers v. Reading Co., 331 U.S. 477, 485, 67 S. Ct. 1334, 1339, 91 L. Ed. 1615; see Thomas v. Atlantic Coast Line R. Co., 5 Cir., 223 F.2d 1, 4".

Petitioners' cause of action was based on a defect in the product. The Fifth Circuit, on pages 16 and 17 of its opinion, states: "All that is in issue is the sufficiency of the evidence to infer a defect in a product." In next to the last paragraph of the conclusion of their Motion for Rehearing in the Fifth Circuit, the Petitioners admit the correctness of the Court's ruling when they state, "Under the record and evidence herein Appellee will candidly admit no defect was proven in the Helene Curtis New Blue Bleach. Under the record the Appellant, Helene Curtis, is entitled to a reversal of the judgment against it." Now they seek to come before this Honorable Court and say that the Fifth Circuit denied

them their right to the benefit of a jury trial under the Seventh Amendment which is in direct opposition to their statement in their Motion for Rehearing in the Fifth Circuit.

The writer has not been able to find a single case from any jurisdiction that holds the manufacturer of a product liable under strict liability if the ingredients in his product were not suitable and reasonably fit to be used for the purpose for which it was used when used in combination with another product. All cases on strict liability impose the test whether the product was reasonably suitable for the purpose for which it was intended at the time it left the factory.

As the Fifth Circuit said on page 14 of its opinion, "The cornerstone rule in products liability is that proof of mere injury furnishes no basis for inferring that the product was defective for its intended use". In addition to the cases cited by the Fifth Circuit, the recent Texas case of *Proctor & Gamble Manufacturing Company v. Langley*, 422 S.W.2d 773, is almost directly in point; this case held that damage following use of a permanent hair waving preparation was not sufficient to sustain a finding that the product was in a defective condition at the time it left the hands of the seller. The Texas case involved the product of but one manufacturer. The present case at bar involves the product of two separate and distinct companies. When the products were mixed together and used, injury following use can be no evidence of defect in either product at the time it left the factory.

The evidence in the present case shows that a strand test was first made on the wife. There is no evidence that the solution used for the strand test was ever removed from the strand of hair. The mixture was then applied to the rest of the hair. If the mixture had been defective, the entire head should have been damaged. As it was, the damage was confined to the vicinity of where the strand test was made.

Petitioners repeat several times in their application that the instructions were followed. However, their own uncontradicted testimony shows beyond dispute that they failed to follow the instructions in the following particulars:

1. Use by novices when the instructions on both products provided that it was to be used by professionals only.

Mrs. Hendren understood this to mean that you had better let it alone, if you did not know what you were doing. the wife never saw this instruction on either product.

2. Mixture of the Helene Curtis New Blue Bleach with the L'Oreal Creme Developer. The third direction found on Plaintiff's exhibit No. 2, page 13 of the Fifth Circuit's opinion, prohibit this in the following words, "Do Not Mix Helene Curtis New Blue Bleach With Anything Except Helene Curtis Creme Developer or a Good Grade of Fresh Twenty-Volume Hydrogen Peroxide".

3. In permitting the mixture to touch the ear and scalp.

The instructions provided "Do confine the mixture to the hair only".

In *Proctor & Gamble Manufacturing Company v. Langley*, *supra*, the Texas courts state, "We are of the opinion that Mrs. Langley's violation of the plain instruction and warning was a misuse of "Milk Wave Lilt" and constituted a defense to her cause of action". See also Restatement of the Law of Tort, Second Edition, Sec. 402(a), Comment J; *Matthias v. Lehn & Fink Products Corporation*, 424 P.2d 284; *Pinto v. Clairol, Inc.*, 324 F.2d 608; *Arata v. Tonegato*, 314 P.2d 130; *Taylor v. Jacobson*, 147 N.E.2d 770; Prosser, *"The Fall of the Citadel"*, 50 Minn. Law Rev. 591; Hursh, *"Products Liability Supplement"*, Sec. 5A:12.

By their fourth paragraph under "Questions Presented" and by their third paragraph under "Constitutional and Statutory Provisions Involved," Petitioners seek at this time to have this Honorable Court grant a Writ of Certiorari under some theory under the Federal Food, Drug & Cosmetic Act.

Although Petitioners did plead a violation of the act in broad terms under their pleadings, they requested no instructed verdict under any theory of the act, submitted no issues under any theory of the act and cannot now complain of a matter they did not properly raise in the trial court or in the Fifth Circuit Court.

CONCLUSION

Neither the Fifth Circuit's holding of insufficiency of the evidence to establish a defect, or its holding of misuse of the products conflicts with any decision by any Circuit Court, or with any local decisions. They do not raise an important question of Federal Law which has not been, but should be settled, by this Honorable Court; they do not decide a federal question in a way probably in conflict with applicable decisions of this Honorable Court and they do not depart from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's power of supervision. A close reading of the opinion of the Fifth Circuit Court in this case reveals that it has followed the established law. It has not pioneered by holding cosmetic makers liable for any harm to anybody under any circumstances.

This Respondent respectfully submits that the petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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